

Clark, (1894) 2 Q.B. 393, it was held following *Ex parte Ford*, 1 Ch. D. 521 that where an undischarged bankrupt traded without the knowledge of his trustee and acquired property and then became bankrupt a second time, property so acquired must be treated as assets in the first bankruptcy. If there was a surplus after payment in full of the debts and expenses under the first bankruptcy, it was held that the trustee in the second bankruptcy would only be entitled to such surplus in so far as the bankrupt had not effectually dealt with it before the second bankruptcy.

Bird v. Philpott, (1900) 1 Ch. 822.

In the course of his judgment in that case, Farwell J. observed that the trustee in the second bankruptcy could only take the property of the bankrupt at the time of the second receiving order, and that what that property was depended upon what the bankrupt had done with it between the date of the first order and the date of the second order.

In the present case accordingly it seems to me clear that the moneys in the hands of the Official Assignee at the date of the Receiving Order being moneys paid to him by the debtor in pursuance of the administration order must be divisible amongst the creditors in the administration proceedings and that the new creditors proving in the bankruptcy can have no rights in respect thereof.

As the Official Assignee pointed out, it is obviously undesirable that the administration order and the Receiving and Adjudication Orders should continue in force at the same time. Such overlapping could only lead to complications and inconvenience. It seems to me that the respective rights of the new and old creditors will be best preserved by the Official Assignee applying to the District Court to rescind the Administration Order, and by my making an Order in the bankruptcy proceedings that for payments by the bankrupt to the Official Assignee similar to those ordered under the Administration Order such payments to commence from the date upon which payments under the administration order ceased.

The Court has power to rescind its own order under section 90 and section 105 (2) seems to contemplate that when subsequent to the making of an administration order it is found that the debts exceed \$500 the Court may set aside the order. The section is not very clearly worded but it seems to me that the intention must be that in such a case administration proceedings may be set aside and, in effect, become merged in and superseded by the bankruptcy proceedings, provided always that the rights of the creditors in the administration proceedings are properly safeguarded.

I accordingly direct as follows:—

1. That, until further order in the bankruptcy the bankrupt shall continue to make the payments ordered by the District Court in the Administration Order.
2. That the Official Assigned shall apply to the District Court to set aside the Administration Order as from the 1st February, 1935, in view of the Receiving and Adjudication Orders made on that date.
3. That the sum of \$364.80 standing to the credit of the bankrupt in his account under the Administration Order together with any further sums which may have since been paid by him under that Order shall be paid out to the creditors under the Administration Order.
4. That the creditors under the Administration Order including Botora Singh can prove in the bankruptcy for any balances still remaining due to them.

Order Accordingly.

[ORIGINAL CIVIL JURISDICTION]

BURTON, Ag. C. J.

August 9, 1935.

ANG CHEE SENG

vs.

TAN KHEE SWEE

[SINGAPORE SUIT No. 178 of 1934]

Practice—Setting aside of Judgment or order.

The Plaintiff sued the Defendant as executor of the estate of Tan Joo Cheow deceased and as no appearance was entered the Plaintiff entered final judgment against the Defendant on the 3rd September, 1934. The judgment was a judgment against the Defendant *simpliciter* and not *levandum de bonis testatoris*. On the 28th September, 1934 the Plaintiff made an application to amend the judgment so as to make it *levandum de bonis testatoris* but eventually no order was made on this application. On the 9th November, 1934 the Plaintiff applied by Summons for an order that the judgment entered on the 3rd September, 1934 be set aside without prejudice to his bringing another suit against the Defendant for the same cause of action and subsequently on the 28th June, 1935 an order was made in the terms of the application. The original judgment having been thus set aside the Plaintiff subsequently applied for and on the 23rd July, 1935 entered judgment against the Defendant *levandum de bonis testatoris*; whereupon one of the beneficiaries of the estate applied for leave to intervene in the proceedings and to set aside the order of the 23rd June, 1935 and the judgment subsequently entered.

Held, that the order of the 28th June, 1935 had been irregularly made without jurisdiction and therefore must be set aside together with the subsequent judgment of the 23rd July 1935. *MacCarthy v. Agard*, (1933) 2 K. B. 417 and *Savena Supramaniam Pillay v. Tan Kah Chiat*, 1934 S. S. L. R. 143; 3 Mal. L. J. 133 followed. *Craven v. Aislabie*, (1736) Barnes 251 not followed.

Adjourned Summons.

The facts are fully set out in the Judgment.

Laycock for Tan Khee Mong, the beneficiary intervening:—

The Court had no jurisdiction to make the order of the 28th June 1935 setting aside the judgment. *MacCarthy v. Agard*, [1933] 2 K.B. 417; *Ainsworth v. Wilding*, (1896) 1 Ch. 673, *Hulbert & anor v. Thurston*, (1931) Weekly Notes 171; *Savena Supramaniam Pillay v. Tan Kah Chiat*, 1934 S.S.L.R. 143; 3 Mal. L. J. 133 and *re Embi bin Haji Abdullah deceased*, 1934 S.S.L.R. 85; 3 Mal. L. J. 71. Although the latter cases specifically refer to the case of amendment of a judgment, the principle is equally applicable to the case of setting aside a judgment as is expressly stated in *MacCarthy v. Agard* and *Ainsworth v. Wilding*. If such were not the case the Plaintiff could always get an amendment by going through the form of setting his own judgment aside.

Johannes and *K. T. Ooi* for the Plaintiff referred to the Yearly Practice 1935 page 147 and *Craven v. Aislabie*, (1736) Barnes 251. The present case is a case of a default judgment thus differing from *MacCarthy v. Agard*. It is the Plaintiff's own judgment and if the Plaintiff likes to have it set aside he ought to be able to do so.

Laycock in reply. Both *Savena Supramaniam Chettiar v. Tan Kah Chiat* and *re Embi bin Haji Abdullah deceased* were cases of default judgments.

Cur. Ad. Vult.

BURTON, AG. C. J.—On 29th March, 1934 the Plaintiff issued a writ against Tan Khee Swee indorsed with a claim for the balance of money due from the defendant to the Plaintiff for money lent by the Plaintiff to the defendant. The claim was for the balance of money due on a charge after realisation of the security; and the indorsement contained a statement that the defendant was sued as the sole executor and trustee of the estate of Tan Joo Cheow deceased. The writ was served by substituted service; no appearance was entered, and final Judgment was entered for the Plaintiff on 3rd September, 1934.

On 28th September, 1934 the Plaintiff made an application to amend the judgment so as to make it *levandum de bonis testatoris*; and on 28th September, 1934 Huggard, C. J. made an order in terms of the summons, but recalled it on 5th October, before it had been drawn up presumably on the authority of *Supramaniam Pillay v. Tan Kah Chiat*, (1934) S.S.L.R. 143; 3 Mal. L. J. 133.

On 9th November the Plaintiff took out a summons asking that the Judgment entered on the 3rd day of September, 1934 "be set aside without prejudice to his bringing another suit against the defendant for the same cause of action." This summons was adjourned from time

to time till on 28th June, 1935, the defendant having been served and not appearing, I made the order asked for; and on 23rd July, 1935 the Plaintiff obtained a judgment in the suit *de bonis testatoris*.

Tan Khee Mong, a son and general residuary legatee, under the will of Tan Joo Cheow, now applies to be allowed to intervene and be added as a defendant, and that the order of 28th June, 1935 be set aside. I think there is no doubt that he can so apply with a view to setting aside the order under Order 27 rule 15. The present case is very similar to *Jacques v. Harrison*, 12 Q.B.D. 165 for it is equally in the interest of both Plaintiff and Defendant that judgment should be given *de bonis testatoris*, and the present procedure is a device to obtain what the Plaintiff could not obtain by amendment. Hawkins, J. at p. 141 said referring to the power to set aside "any judgment by default", "It is not necessary to prove collusion between them, but I think that when this action was brought the Plaintiff knew that in all probability the defendant would not defend; first the defendant intimated it; secondly it was his interest not to defend. for if he held the property he would leave himself under a liability which if his lease were put an end to, he would be relieved from."

I have first to consider therefore whether the Order of 28th June, 1935 was correctly made. I made the original order on the authority of a Note on p. 147 of the Yearly Practice 1935 headed "Withdrawal or Waiver of judgment" which states "If a Plaintiff who has signed judgment wishes to withdraw it or have it set aside, he may do so." This is a note to Order 13 rule 10, which corresponds also with our Order 13 rule 10. But Order 13 deals with default of appearance and rule 10 only refers to Judgments entered pursuant to the preceding rules; and should, I think, only authorise applications by a defendant. The only authority cited by the Yearly Practice is *Craven v. Aislabie*, (1736) Barnes 251 which is of course long before the establishment of our present procedure. But a reference to that case shows that there was an irregularity in the judgment; and I have not found the case cited anywhere else.

If it is necessary to distinguish this case, it is clear that there is no irregularity in our case. The claim was on the covenant of a charge made 6 years and 10 months after the death of the testator; and there has never been any allegation that the charge was made under sanction of the Court. There is no doubt, I think, that an executor is personally liable for money borrowed after the death of the testator (*Farhall v. Farhall* 7 Ch. App. 123). Indeed the decree correctly represented a correct judgment; and I think therefore it cannot be set aside [*MacCarthy v. Agard*, (1933) 2 K.B. 417.]

It follows that my order of the 28th June, 1935 should not have been made, and the judgment entered in pursuance of it should not have been entered. Moreover for the very reason that the judgment of 3rd September, 1934 was correct, the judgment of the 23rd July, is wrong; and *ex debito justitiae* it must be set aside [*Anlaby v. Praetorius*, (1888) 20 Q.B.D. 764.]

I therefore set aside the order of 28th June, 1935 and the judgment of 23rd July. It follows that the judgment of 3rd September, 1934 is restored; as it should never have been set aside.

Order accordingly.

Solicitors for the Plaintiff—

Wee Swee Teow & Co.

Solicitors for Tan Khoo Mong—

Braddell Brothers.

[ORIGINAL CIVIL JURISDICTION]

TERRELL, J.

August 10, 1935.

RE M. SANDRASAGRAM.

[SINGAPORE BANKRUPTCY No. 135 of 1932]

Ordinance No. 44 (Bankruptcy)—vesting of property.

Under the rules of the provident fund of the Municipality of Singapore both sides of the provident fund namely the contributions side and the donations side *prima facie* vest in the Official Assignee upon the bankruptcy of a member of the fund. Any money added to the fund since the date of the bankruptcy is after-acquired property in the nature of personal earnings.

Motion.

Adityan for the Bankrupt

E. B. Williams, Official Assignee in Person.

The facts and arguments sufficiently appear from the Judgment.

Cur. Ad. Vult.

TERRELL, J.—The question on this motion concerns a bankrupt's interest in his share of the Singapore Municipal Provident Fund, the bankrupt's service with the Municipality having terminated during his bankruptcy. According to the affidavit of A. H. Assiter, the Municipal Treasurer, sworn on 16th July, 1935 the particulars of the Fund are as follows:—

As on 30th June, 1932	
Contributions side	\$1,615.52
Donations side	\$1,638.59
Additions between 30th June, 1932 and 30th June, 1935.	
Contributions side	724.71
Donations side	849.67
Present balance to bankrupt's credit	
Contributions side	340.23
Donations side	488.26

It will be seen that the fund remaining in the hands of the Municipal Commissioners consists of two parts, the first the bankrupt's own

contributions, and the second the Donations of the Municipal Commissioners. The bankrupt obtained payment of \$2,000 from each side of the Fund on the 18th day of February, 1935. The Official Assignee was aware that the Municipal Commissioners intended to pay him but according to the practice then prevailing in the Bankruptcy Office the Official Assignee was under the impression that neither part of the Fund vested in him. On January, 23rd, 1935, however, Whitley J. gave Judgment in the case of *In re Daniel* reported in the March, 1935 issue of the Mal.L.J. Vol. IV p.50, and this case is an authority that the contributions side of the Fund vested in the Official Assignee. The bankrupt accordingly makes no claim to the sum of \$340.23 remaining to the credit of the contributions side. All that he claims by this motion is the sum of \$488.26 which stands to the credit of the Donations side. The case of *In re Daniel* admittedly involved no finding as to the Donations side, but the Official Assignee now submits that the principle of that case is wide enough to cover the Donations side as well. Counsel for the bankrupt relied on the decision of Brown J. in the case of *Re Mohamed Ariff*, 1926 S.S.L.R. p.166. It will be necessary to consider these two cases carefully to see what exactly they decided.

The question in the case of *Re Mohamed Ariff* concerned a Government gratuity under the Pensions (Gratuities) Ordinance 1926 which was payable to the bankrupt who retired from the Government service during the course of his bankruptcy. Section 8 of this Ordinance reads as follows:—

“No gratuity under this Ordinance shall be liable to be attached, sequestered or levied upon for or in respect of any debt or claim whatsoever.”

Another relevant section referred to by the learned Judge is section 55 (3) of Ordinance No. 44 (Bankruptcy) which reads as follows:—

“Where a bankrupt is in the receipt of a salary or income other than as aforesaid, or is entitled to any half pay or pension or compensation granted by the Government, the Court, on the application of the Official Assignee, shall, subject to the provisions of any enactment for the time being regulating the grant and payment of pensions, from time to time make such order as it thinks just for the payment of the salary, income, half pay, pension or compensation or of any part thereof to the Official Assignee, to be applied by him in such manner as the Court directs.”

The learned Judge held that the gratuity was “compensation” within the meaning of section 55 (3) and was accordingly of the opinion